

No. 12808

2675

United States
Court of Appeals
For the Ninth Circuit.

BANKERS LIFE COMPANY, a Corporation,
Appellant,
vs.
RUTH JACOBY,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

MAY 7 1951

PAUL H. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Defendant and Appellant.

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Attorney for Plaintiff and Appellee.

In the District Court of the United States
for the Northern District of California
No. 29187G

RUTH JACOBY,

Plaintiff,

vs.

BANKERS LIFE COMPANY, a Corporation,
Defendant.

COMPLAINT FOR DECLARATORY
RELIEF

Plaintiff above named complains of the defendant above named and for cause of action alleges:

I.

That the jurisdiction of this court is based upon diversity of citizenship in that plaintiff is a citizen of the State of California and resides in the Northern District of California and defendant is a corporation organized and existing under and by virtue of the laws of the State of Iowa, has its principal place of business in the State of Iowa and is a citizen of the State of Iowa.

II.

That the amount in controversy in this action is in excess of \$3,000.00, to wit, is a policy of life insurance in principal sum of \$5,000.00 upon the life of one Lionel A. Jacoby.

III.

That the only claimant to said policy of life insurance is this plaintiff; that at one time Betty Jacoby and Lionel A. Jacoby claimed to be the owners of said policy, but heretofore the United States District Court for the District of Arkansas, in an action in which this plaintiff was plaintiff and Betty Jacoby and Lionel A. Jacoby were defendants duly gave and made its order directing Betty Jacoby and Lionel A. Jacoby to transfer said policy to this plaintiff, and in default of such transfer being made duly gave and made its order appointing R. G. Hines the agent of Betty Jacoby and Lionel A. Jacoby to make said transfer and pursuant to that authority on January 14, 1949, said R. G. Hines, as such agent aforesaid, sold, assigned and transferred the right, title and interest of Betty Jacoby and Lionel A. Jacoby in said policy to plaintiff and plaintiff ever since has been and now is the owner thereof.

IV.

That the subject of this action is the aforesaid policy, which is an agreement in writing between Lionel A. Jacoby and defendant by virtue of which defendant agreed to pay to any person designated by Lionel A. Jacoby the sum of \$5,000.00 upon the death of Lionel A. Jacoby and some different or lesser sum to Lionel A. Jacoby upon demand of the said Lionel A. Jacoby and surrender of said policy.

V.

That plaintiff is unable to surrender said policy for the reason that after said United States District Court for the District of Arkansas made its judgment aforesaid, Lionel A. Jacoby, in contempt of said judgment, absconded and is now a fugitive from justice and his whereabouts is unknown and he and only he knows the whereabouts of said policy; that Betty Jacoby is the beneficiary named in said policy, and she, too, has absconded in contempt of said judgment and her whereabouts is unknown.

VI.

That attached hereto and marked Exhibit "A" is a true copy of the assignment made by R. G. Hines as agent aforesaid, and plaintiff has delivered a duplicate original thereof to defendant and defendant has possession thereof. That attached hereto and marked Exhibit "B" is a true copy of said order of said United States District Court for the District of Arkansas and plaintiff has delivered a certified copy of said original order to defendant and defendant has possession thereof.

VII.

That plaintiff asks relief pursuant to U. S. Code, Title 28, Section 400 for the reason that notwithstanding said assignment, said policy has been lapsed for non-payment of premiums and defendant refuses to recognize in plaintiff any right in said policy unless plaintiff delivers possession of said policy to defendant, and insists that the sole

and only right which plaintiff may exercise, and then only if plaintiff surrenders said policy, is in the event Lionel A. Jacoby dies within 19 years defendant will pay to plaintiff upon delivery of said policy to defendant the sum of \$5,000.00.

VIII.

That plaintiff contends and insists that with or without the delivery of said policy to defendant, plaintiff is entitled to elect and demand the same cash surrender value that Lionel A. Jacoby could have demanded upon surrender of said policy upon her making a first demand therefor, or to await the death of Lionel A. Jacoby within 19 years and then receive from defendant the sum of \$5,000.00 without surrender or delivery of said policy to defendant.

Wherefore plaintiff prays that this court determine as between plaintiff and defendant the rights of plaintiff in said policy, and particularly the rights of plaintiff in the event possession of said policy cannot hereafter be delivered to defendant, and the right of plaintiff to exercise the right given to Lionel A. Jacoby to surrender his rights under said policy for the payment of cash, and for such other and further relief as may be proper in the premises.

/s/ FRANCIS T. CORNISH,
Attorney for Plaintiff.

State of California,
County of Alameda—ss.

Ruth Jacoby, being first duly sworn, deposes and says: That she is the plaintiff above named, that

she has read the foregoing Complaint for Declaratory Relief and knows the contents thereof; that the facts therein stated are true of her own knowledge, except as to the facts therein stated on information and belief, and as to those facts she believes it to be true.

/s/ RUTH JACOBY.

Subscribed and sworn to before me this 28th day of September, 1949.

[Seal] /s/ FRANCIS M. GUIDICI,
Notary Public in and for the County of Alameda,
State of California.

EXHIBIT A

Absolute Assignment

For value received, the undersigned hereby sell, assign, transfer and set over absolutely unto Ruth Jacoby, whose Post Office address is 448 - 41st Street, City of Oakland, State of California, all of the undersigned's right, title and interest in and to contract No. 882714, issued by Bankers Life Company, Des Moines, Iowa, to or upon the life of Lionel A. Jacoby, together with all of the undersigned's powers, privileges, benefits and advantages therein provided or derived therefrom (including, unless otherwise restricted, but not limited to the following: any dividends, loan values, surrender values, disability benefits and the power to change the beneficiary thereunder) subject to all the terms and conditions in said contract and any indebtedness thereon.

This Assignment Is not Given as Collateral Se-

curity for the Payment of any Indebtedness but Is Made and Intended to Transfer to the Assignee Absolutely and Irrevocably all Incidents of Ownership in Said Contract. This Assignment Does not Constitute a Change of Beneficiary.

Further notices and correspondence regarding this contract are to be directed to the assignee at the address given above, or to such other address as the assignee may direct in writing. The assignee as owner shall have the power to execute without the undersigned joining, all requests, releases, agreements or other instruments necessary or required to enable the assignee to realize the rights, powers, privileges, benefits and advantages hereby transferred, the same to be effective and binding as if executed by the undersigned.

Witness my hand at Fort Smith, in the State of Arkansas this 14th day of January, 1949.

R. G. HINES,

Court appointed agent of Lionel A. Jacoby and Betty Jacoby, his wife, per attached certified copy of order in Civil Case No. 787 United States District Court for the Western District of Arkansas, Fort Smith Division.

Witnesses:

/s/ ALLIE G. BLAND,
1215 N. 13 Street,
Fort Smith, Arkansas.

HUGH M. BLAND,
200 Professional Bldg.,
Fort Smith, Arkansas.

EXHIBIT B

In the United States District Court, Western
District of Arkansas, Fort Smith Division
No. 787 Civil

RUTH JACOBY,

Plaintiff,

vs.

LIONEL JACOBY and BETTY JACOBY,
Defendants.

ORDER

This matter comes on to be heard upon the application of the plaintiff to appoint some suitable person to act in the place and stead of Lionel A. Jacoby and Betty Jacoby to execute such transfers, papers, assignments, documents, and conveyances as may be necessary to carry into effect said judgment ordered and directed herein on the 22nd day of November, 1948, under the terms and provisions of Rule 70 of the Federal Rules of Civil Procedure, and it appearing to the Court that the defendants, and each of them, have absconded from the jurisdiction of this Court and failed within the time allowed in said decree to execute the necessary transfers, papers, assignments, documents, and conveyances, as they were ordered to do and that R. G. Hines of Fort Smith, Arkansas, is a suitable person to execute such conveyances in the place and stead of said defendants, and when so done by him, his acts to have the same effect as if done by the defendants.

It Is Therefore Ordered that R. G. Hines be, and he hereby is, appointed and directed by this Court to sign the name of Lionel A. Jacoby to a proper conveyance of his one-half ($\frac{1}{2}$) interest in the vacant lot in Orange Heights, Oroville, California, and to execute the same to the plaintiff, Ruth Jacoby, in the place and stead of Lionel A. Jacoby, such conveyance to be as effective when so done as if done by the defendant, Lionel A. Jacoby.

It Is Further Ordered that R. G. Hines be, and he hereby is, appointed and directed to execute an absolute assignment of all of the interest of the defendants, Lionel A. Jacoby and Betty Jacoby, to a certain policy of insurance No. 882714, issued by the Bankers Life Insurance Company of Des Moines, Iowa, and to sign their names to said assignment and perform every act and deed necessary to effect an absolute assignment of said policy to the plaintiff, Ruth Jacoby, his acts and deeds in so doing to have the same effect as if done by the defendants, Lionel A. Jacoby and Betty Jacoby.

Dated at Fort Smith, Arkansas, this 12th day of January, 1949.

JNO. E. MILLER,

United States District Judge.

Filed Jan. 12, 1949.

TRUSS RUSSELL,

Clerk.

[Endorsed]: Filed October 5, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT BANKERS
LIFE COMPANY

Defendant Bankers Life Company, a corporation, answers plaintiff's Complaint as follows:

I.

Admits the allegations of Paragraph I.

II.

Denies all and singular the allegations of Paragraph II. Denies that the amount in controversy is in excess of \$3,000. Denies that any amount whatsoever is in controversy. Denies that there is any justiciable controversy.

In this connection defendant alleges that there are two other suits now pending in other courts concerning the subject matter of this action. The first suit is in the Superior Court of the State of California in and for the County of Alameda, entitled, "Frances Guidici, Plaintiff, vs. Lionel A. Jacoby, Betty M. Jacoby, Ida Jacoby, Bankers Life Company, a corporation, and the Mutual Life Insurance Company of New York, a corporation, Defendants," numbered 208,570, records of said court. In that case the plaintiff is the receiver for Ruth Jacoby, the plaintiff herein. The second suit is in the District Court of the United States, Western District of Arkansas, Forth Worth Division, entitled, "Ruth Jacoby, Plaintiff, vs. Lionel A. Jacoby and Betty Jacoby, Defendants," and is

Civil Action No. 787, records of said court. The objects and purposes of both of those actions are to force the Defendant Bankers Life Company to pay to plaintiff the cash surrender value of the defendant's policy No. 882714 issued upon the life of Lionel A. Jacoby without the actual surrender of the policy itself. That is contrary to the policy provisions which require the surrender of said policy as a condition precedent to the payment of the cash surrender value.

III.

Denies all and singular the allegations of Paragraph III and alleges that on February 14th, 1936, plaintiff declared in writing that said policy No. 882714 was the separate property of Lionel A. Jacoby, and alleges that on July 15th, 1947, Betty M. Jacoby became the owner of said policy and ever since has been and is now the owner of said policy. Defendant further alleges that plaintiff has no interest in said policy.

IV.

Denies all and singular the allegations of Paragraph IV.

V.

For lack of information or belief defendant denies all and singular the allegations of Paragraph V.

VI.

Answering Paragraph VI of the Complaint, defendant admits that Exhibit "A" appears to be a copy of a document delivered to defendant and now

in its possession, and admits that Exhibit "B" appears to be a copy of a portion of a document delivered to defendant and now in its possession, but defendant has no information that the purported certification thereof is valid. Denies all and singular the allegations of Paragraph VI not herein expressly admitted.

VII.

Answering Paragraph VII, defendant denies all and singular the allegations thereof, except it admits the policy has been lapsed for non-payment of premiums and in this connection alleges as follows:

Policy No. 882714 issued to Lionel A. Jacoby became in default for non-payment of the semi-annual premium, amounting to \$78.05, due December 7, 1948, and the grace period provided for the payment of this premium expired on January 7, 1949, without payment of said premium or any part thereof.

On December 7, 1948, the policy according to its terms provided a total cash value of \$2,022.88, including dividend credits amounting to \$490.78. Pursuant to the terms of the policy said total cash value of \$2,022.88 was applied to purchase extended term insurance to the amount of \$5,000.00 for a period of 25 years and 84 days from December 7, 1948.

VIII.

Answering Paragraph VIII, defendant alleges that there has been no demand made upon it for the cash surrender value of said policy by any person entitled to make such demand, and defendant further alleges that Policy No. 882714 has never been

surrendered, or offered for surrender, to defendant by any one.

As a separate defense, defendant alleges that:

I.

The Complaint does not state a claim against defendant.

As a second separate defense, defendant alleges that:

I.

The Complaint does not state a claim for declaratory relief.

As a third separate defense, defendant alleges that:

I.

The Court does not have jurisdiction of the subject matter of this action because the suit is based upon diversity of citizenship and the amount in controversy is less than \$3,000.00.

As a fourth separate defense, defendant alleges that:

I.

The Complaint does not state a claim because necessary parties, to wit, Lionel A. Jacoby and Betty M. Jacoby, are not parties hereto.

As a fifth separate defense, defendant alleges that:

I.

Defendant is a corporation incorporated under the laws of the State of Iowa and is admitted to do and is doing a life insurance business in the State of California, and subject to the jurisdiction of the courts of the State of California.

II.

There is now pending in the Superior Court of the State of California in and for the County of Alameda action No. 208570, wherein plaintiff herein, by and through her receiver, Francis Guidici, is suing this same defendant for the same thing she is suing for here, namely, the surrender value of defendant's Policy No. 882714.

III.

The Superior Court of the State of California in and for the County of Alameda is a court of general jurisdiction and has acquired jurisdiction over this defendant, and the plaintiff can obtain adequate relief in said Superior Court action without prosecuting this action or otherwise creating a multiplicity of suits and without unnecessarily invoking the doubtful jurisdiction of this court.

IV.

For the reasons herein set forth this Court should decline to entertain jurisdiction of, or attempt to adjudicate, the plaintiff's claim.

Wherefore, defendant prays that plaintiff go hence without pay, for its costs of suit and such other relief as may be proper.

/s/ BURTON L. WALSH,
KNIGHT, BOLAND &
RIORDAN,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 18, 1949.

In the District Court of the United States for the
Northern District of California, Southern Di-
vision

No. 29187

RUTH JACOBY,

Plaintiff,

vs.

BANKERS LIFE COMPANY, a Corporation,

Defendant.

MEMORANDUM OPINION

FRANCIS T. CORNISH, ESQ.,

2140 Shattuck Avenue,

Berkeley 4, California,

Attorney for Plaintiff.

BURTON L. WALSH, ESQ.,

KNIGHT, BOLAND & RIORDAN,

444 California Street,

San Francisco 4, California,

Attorneys for Defendant.

Erskine, District Judge

It is the opinion of this Court that the legal effect of the judgment and decree in the case of Ruth Jacoby v. Lionel A. Jacoby and Betty Jacoby, filed in the United States District Court for the Western District of Arkansas, on November 22, 1948, together with the order entered by said Court in said action on January 12, 1949, and the "Absolute Assignment" executed on January 14, 1949, by

the court appointed agent of Lionel A. Jacoby and Betty Jacoby, was to transfer to Ruth Jacoby, the plaintiff in this action, all the right, title, interest and incidents of ownership in Bankers Life insurance policy number 882714 previously held by Lionel A. Jacoby and Betty Jacoby.

This Court further holds that at the time of said assignment, default had been made in the payment of the premium on said policy and the policy not having been surrendered for cash or for a paid-up participating policy within one month after said default, as required by the terms of the policy, the automatic extended term insurance clause of the policy went into effect, the amount of said extended term insurance being equal to the face amount of the policy and existing dividends, if any. However, the policy also provides that "extended insurance . . . may be surrendered at any time for a cash value equal to the full reserve thereon at the time of the surrender . . ." Ruth Jacoby, the present owner of all right, title and interest in said policy, is entitled to this cash surrender value, if she desires to exercise said option. If the plaintiff desires that the policy retain its present status of extended term insurance, she has the right to name the beneficiary and change said beneficiary at any time.

The defendant company will not be prejudiced by such payment or made subject to double liability. By virtue of the court assignment, Lionel A. and Betty Jacoby were divested of all interest in said policy. The defendant has been given no-

tice of said assignment. There is no evidence of any assignment by Lionel Jacoby either prior or subsequent to said court assignment. Any such attempted assignment would be a nullity and not binding upon the defendant company.

Findings of fact, conclusions of law and judgment in accordance with the opinions expressed herein will be prepared by counsel.

Dated: October 16th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed October 16, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on October 3, 1950, before the above-named Court, Honorable Herbert W. Erskine presiding, sitting without a jury, a jury trial having been expressly waived by all the parties, Francis T. Cornish, Esq., appearing as attorney for plaintiff and Messrs. Knight, Boland & Riordan and Burton L. Walsh, Esq., appearing as attorneys for defendant. Evidence both documentary and oral was adduced and the cause was thereupon argued and submitted, and the Court being fully advised, now makes its findings of fact as follows:

FINDINGS OF FACT

I.

At the time of the commencement of this action plaintiff was a citizen of the State of California and a resident of the Northern District of California, Southern Division thereof, and defendant was a corporation incorporated under the laws of the State of Iowa and was admitted to do, and is doing, a life insurance business in the State of California.

II.

The amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

III.

On June 7, 1930, defendant Bankers Life Company made, issued and delivered its policy No. 882714 to Lionel A. Jacoby insuring his life to the face amount of \$5,000.00 upon the Paid Up at Age 65 Plan. The insured reserved the right to revoke the beneficiary. The insured also elected to have dividends left to accumulate to the credit of the policy, with interest at not less than three and one-half per cent per annum as determined by the company, and payable at the maturity of the policy by death or endowment or upon surrender of the policy for cash or reduced paid-up insurance. The semi-annual premium payable on the 7th day of June and the 7th day of December of each year until paid up is \$78.05.

IV.

As to Change of Beneficiary the policy provides as follows:

“When the right of revocation has been reserved or in case of the death of any Beneficiary under either a revocable or irrevocable designation, the Insured, subject to any existing assignment of this Policy may, while the Policy is in force, designate a new Beneficiary with or without reserving right of revocation by filing written notice thereof at the Home Office of the Company accompanied by the Policy for suitable indorsement thereon. Such change shall take effect when indorsed on the Policy by the Company and not before. If any Beneficiary shall die before the Insured, the interest of such Beneficiary shall pass equally to the survivor or survivors, unless otherwise provided in the Policy. If no Beneficiary shall survive the Insured, then payment shall be made to the executors or administrators of the Insured.”

V.

On July 8, 1947, pursuant to the above policy provision, the beneficiary of said policy was changed to Betty M. Jacoby, wife of the insured, and said change of beneficiary was endorsed on the policy.

VI.

As to Assignment, the policy provides as follows:

“No assignment of this Policy shall be binding upon the Company unless it be filed with the Company at its Home Office. The original assignment must be produced when the Policy is presented for payment. The Company as-

sumes no responsibility as to the validity of any assignment.”

VII.

On July 17, 1947, defendant received in its home office in Des Moines, Iowa, the following document, purporting to be an assignment by Lionel A. Jacoby of all his right, title and interest in and to said Policy No. 882714 to Betty M. Jacoby:

“Original

“Duplicate Received and Filed

“Home Office July 17, 1947

“Bankers Life Company

“By J. S. Corley, Secretary

“For Value Received, I hereby assign, transfer and set over to Betty M. Jacoby, whose post office address is Route 1, Pleasant Hill, Missouri, all my right, title and interest in and to the policy of insurance known as No. 882714 dated issued by Bankers Life Company of Des Moines, Iowa, on the life of Lionel A. Jacoby and I hereby guarantee the validity and sufficiency of the foregoing assignment and the same will forever warrant and defend.

“Witness my hand and seal at Kansas City, Mo., this 15th day of July, 1947.

“LIONEL A. JACOBY. (LS)

“ (LS)

“Witness

“ROSE PELLIGRINI.

“State of Missouri,
 “County of Jackson—ss.

“On this 15th day of July, 1947, before me personally came Lionel A. Jacoby to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

“FRANCES E. COOKE,
 “Notary Public.

“My Commission expires July 23, 1947.

“The duplicate original of this assignment was filed in the office of the Bankers Life Company of Des Moines, Iowa, on the 15th day of July, 1947.”

VIII.

The insured Lionel A. Jacoby continued to pay the semi-annual premiums of \$78.05 to and including June 7, 1948.

IX.

The policy contains the following Non-Forfeiture Provisions:

“At the end of any Policy year or within one month after any default in payment of premium, but not later, provided three full years' premiums shall have been paid, this Policy may be surrendered with a proper release to the Company at its Home Office for:

“(A) Its Cash Surrender Value.

“This value shall be equal to the reserve on the face amount of insurance and on any paid up additions less any indebtedness on the Policy and a charge not exceeding one per cent of

the amount of the Policy for the third to the ninth years inclusive, after which no surrender charge shall be made. There is no cash value to the Total and Permanent Disability or Double Indemnity Benefits. (See Table of Guarantees below.)

“Or, (B) A Paid Up Participating Policy payable as herein provided.

“The amount of the paid up Policy will be such as the cash surrender value, above provided for, will purchase at the attained age of the Insured, using net single premium rates according to the reserve basis stated on page one. (See Table of Guarantees below.)

“If the Policy be not surrendered for cash or paid up, as above provided, after payment of three full years' premium and upon default in payment of any premium the insurance will be automatically extended from the due date of the premium in default without participation in surplus. The amount of insurance will be equal to the face amount of the Policy and existing dividend additions, if any, less any indebtedness to the Company hereon, said indebtedness being cancelled thereby.

“The term of extended insurance will be such as the cash surrender value, above provided, and dividend credits, if any, will purchase at the attained age of the Insured, using net single premium rates according to the reserve basis on page one. The term of extended insurance includes the days of grace. If the premium loan provision has been exercised, it will replace this

option in so far as applicable. The Policy need not be surrendered for endorsement. Where the laws of any state in which this Policy is delivered conflict with the above method, such laws will govern. (See Table of Guarantees below.)

“The extended insurance or the paid-up Policy or any paid-up additions may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender less any indebtedness to the Company.”

X.

The policy lapsed for non-payment of premium due December 7, 1948. Plaintiff Ruth Jacoby knew the policy provided for thirty-one days of grace for the payment of the premium and she knew before the end of the grace period that the premium had not been paid on the due date of December 7, 1948, but she did not pay that or any other premium.

XI.

On December 7, 1948, the policy had a total cash surrender value of \$2,022.88, including dividend credits amounting to \$490.78.

XII.

Said policy No. 882714 has never been surrendered for any cash surrender value or for any paid-up participating policy.

XIII.

Pursuant to the Non-Forfeiture Provisions of the policy set forth in Finding IX above, the in-

insurance upon the life of Lionel A. Jacoby was automatically extended from December 7, 1948, without participation in surplus. The amount of said extended insurance is equal to the face amount of the policy, namely \$5,000.00. The term of said extended insurance is 25 years and 84 days from December 7, 1948, that being the term which the cash surrender value, including dividend credits, as of December 7, 1948, will purchase at the attained age of the insured.

XIV.

On November 22, 1948, the United States District Court in Arkansas rendered the following judgment:

“District Court of the United States, Western District of Arkansas, Fort Smith Division

“Civil Action No. 787

“RUTH JACOBY,

“Plaintiff,

“vs.

“LIONEL A. JACOBY and BETTY JACOBY,

“Defendants.

“JUDGMENT AND DECREE

“On this 22nd day of November, 1948, comes on this cause for trial before the court without the intervention of a jury, the plaintiff appearing in person and by Messrs. Bland, Kincannon & Bethell, her attorneys, and the defendants appearing in per-

son and by Messrs. Partain, Agee & Partain, their attorneys.

“Upon consideration of the pleadings, depositions and testimony of witnesses, together with the exhibits thereto, the court has made and filed herein its Findings of Fact and Conclusions of Law, separately stated, and in accordance with same It Is Ordered, Adjudged and Decreed:

“That the plaintiff, Ruth Jacoby, shall have and recover of and from the defendant, Lionel A. Jacoby, the sum of \$5700.00, with interest at the rate of 6 per cent per annum to be calculated on the monthly payments that should have been made on the 15th day of each and every month since March 15, 1947, together with the costs of this action;

“That the preliminary injunction entered herein on October 25, 1948, be and it is hereby made permanent, and the defendants and each of them, their agents, servants, and all persons acting by and under their control and authority, are hereby restrained and enjoined from sequestering, encumbering, destroying, alienating, or removing from the jurisdiction of this court any property, real or personal, now in their possession or under their control;

“That the one-half interest owned by the defendant Lionel A. Jacoby, in the vacant lot in Orange Heights, Oroville, California, be subject to the payment of the judgment herein;

“That the defendants Lionel A. Jacoby and Betty Jacoby surrender to the plaintiff all their right, title and claim upon the policy of insurance, No. 822714,

issued by the Bankers Life Company of Des Moines, Iowa, and that the cash value of said insurance policy be applied to the payment of the amount herein adjudged to be due the plaintiff;

“That the value of the Cadillac automobile now in the possession of the defendants be applied to the payment of the judgment herein;

“That for the purposes of reducing the said automobile and the said insurance policy to cash, the defendants, either or both, are authorized, subject to the approval of the court, to execute such assignments, transfers and conveyances as may be necessary, but all payments and considerations received for said assignment, transfers, and conveyances shall be made payable to the plaintiff, Ruth Jacoby, and applied to the payment of the judgment herein;

“That the defendant Lionel A. Jacoby be and is given 30 days from this date in which to pay the judgment herein rendered, and in the event the said defendant shall not have paid and discharged said judgment in full or or before 30 days from this date, citation and rule will be issued, upon the request of plaintiff, requiring the said defendant, Lionel A. Jacoby, to show cause why he should not be held in contempt of court; and

“That jurisdiction of this cause is retained until further order of the court.

[Seal]

“JNO. E. MILLER,

“U. S. District Judge.”

XV.

On January 12, 1949, said United States District Court in Arkansas made the following order concerning the foregoing judgment:

“In the United States District Court, Western District of Arkansas, Fort Smith Division

“No. 787 Civil

“RUTH JACOBY,

“Plaintiff,

“vs.

“LIONEL A. JACOBY and BETTY JACOBY,

“Defendants.

“ORDER

“It appearing to the Court upon motion of the plaintiff that there was a clerical mistake in the judgment rendered herein on the 22nd day of November, 1948, in that the policy of insurance issued by the Bankers Life Insurance Company of Des Moines, Iowa, was described as policy No. 822714, when in truth and in fact said policy should have been numbered 882714, and that said judgment should be corrected to so show.

“It Is Therefore Ordered, that the Clerk of this Court be, and he hereby is, ordered and directed to correct said judgment to show that the policy issued by the Bankers Life Insurance Company of Des Moines, Iowa, is No. 882714, instead of No. 822714.

“Dated at Fort Smith, Arkansas, this 12th day of January, 1949.

“JNO. E. MILLER,

“United States District Judge.

“Filed Jan. 12, 1949.

“TRUSS RUSSELL,

“Clerk.”

XVI.

On January 12, 1949, the said United States District Court in Arkansas made the following order:
“In the United States District Court, Western District of Arkansas, Fort Smith Division
“No. 787 Civil

“RUTH JACOBY,

“Plaintiff,

vs.

“LIONEL A. JACOBY and BETTY JACOBY,

“Defendants.

“ORDER

“This matter comes on to be heard upon the application of the plaintiff to appoint some suitable person to act in the place and stead of Lionel A. Jacoby and Betty Jacoby to execute such transfers, papers, assignments, documents, and conveyances as may be necessary to carry into effect said judgment ordered and directed herein on the 22nd day of November, 1948, under the terms and provisions

of Rule 70 of the Federal Rules of Civil Procedure, and it appearing to the Court that the defendants, and each of them, have absconded from the jurisdiction of this Court and failed within the time allowed in said decree to execute the necessary transfers, papers, assignments, documents, and conveyances, as they were ordered to do and that R. G. Hines of Fort Smith, Arkansas, is a suitable person to execute such conveyance in the place and stead of said defendants, and when so done by him, his acts to have the same effect as if done by the defendants.

“It Is Therefore Ordered that R. G. Hines be, and he hereby is, appointed and directed by this Court to sign the name of Lionel A. Jacoby to a proper conveyance of his one-half ($\frac{1}{2}$) interest in the vacant lot in Orange Heights, Oroville, California, and to execute the same to the plaintiff, Ruth Jacoby, in the place and stead of Lionel A. Jacoby, such conveyance to be as effective when so done as if done by the defendant, Lionel A. Jacoby.

“It Is Further Ordered that R. G. Hines be, and he hereby is, appointed and directed to execute an absolute assignment of all of the interest of the defendants, Lionel A. Jacoby and Betty Jacoby, to a certain policy of insurance No. 882714, issued by the Bankers Life Insurance Company of Des Moines, Iowa, and to sign their names to said assignment and perform every act and deed necessary to effect an absolute assignment of said policy to the plaintiff, Ruth Jacoby, his acts and deeds in so doing to

have the same effect as if done by the defendants, Lionel A. Jacoby and Betty Jacoby.

“Dated at Fort Smith, Arkansas, this 12th day of January, 1949.

“JNO. E. MILLER,
“United States District
Judge.

“Filed Jan. 12, 1949.

“TRUSS RUSSELL,
Clerk.”

XVII.

On January 14, 1949, the following document was executed by R. G. Hines:

“ABSOLUTE ASSIGNMENT

“For value received, the undersigned hereby sell, assign, transfer and set over absolutely unto Ruth Jacoby, whose Post Office address is 448-41st Street, City of Oakland, State of California, all of the undersigned’s right, title and interest in and to contract No. 882714, issued by Bankers Life Company, Des Moines, Iowa, to or upon the life of Lionel A. Jacoby, together with all of the undersigneds’ powers, privileges, benefits and advantages therein provided or derived therefrom (including, unless otherwise restricted, but not limited to the following: any dividends, loan values, surrender values, disability benefits and the power to change the beneficiary thereunder) subject to all the terms and conditions in said contract and any indebtedness thereon.

“This Assignment is not Given as Collateral Se-

curity for the Payment of any Indebtedness but Is Made and Intended to Transfer to the Assignee Absolutely and Irrevocably all Incidents of Ownership in Said Contract. This Assignment Does not Constitute a Change of Beneficiary.

“Future notices and correspondence regarding this contract are to be directed to the assignee at the address given above, or to such other address as the assignee may direct in writing. The assignee as owner shall have the power to execute without the undersigned joining, all requests, releases, agreements or other instruments necessary or required to enable the assignee to realize the rights, powers, privileges, benefits and advantages hereby transferred, the same to be effective and binding as if executed by the undersigned.

“Witness my hand at Fort Smith, in the State of Arkansas this 14th day of January, 1949.

/s/ “R. G. HINES,

“Court appointed agent of Lionel A. Jacoby and Betty Jacoby, his wife, per attached certified copy of order in Civil Case No. 787 United States District Court for the Western District of Arkansas, Fort Smith Division.

“Witnesses:

/s/ “ALLIE G. BLAND,
 “1215 N. 13 Street
 “Fort Smith, Arkansas.

/s/ “HUGH M. BLAND,
 “200 Professional Bldg.
 “Fort Smith, Arkansas.”

XVIII.

Copies of the Judgment, Orders and Assignment set forth in Findings XIV, XV, XVI and XXVII were received by defendant Bankers Life Company at Des Moines, Iowa, on or about January 25, 1949.

XIX.

Policy No. 882714 has never been surrendered to defendant Bankers Life Company for any cash surrender value. Plaintiff Ruth Jacoby does not have possession of said policy and does not know the whereabouts of said policy. The person last known to have possession of said policy No. 882714 is the insured, Lionel A. Jacoby. There is no evidence that said policy has been lost, destroyed or stolen. There is no evidence that Lionel A. Jacoby cannot surrender the policy. The whereabouts of Lionel A. Jacoby are unknown.

XX.

A controversy exists between the parties to this action, first, as to who is the beneficiary entitled to the proceeds of insurance in the event of the death of the insured within the extended term, and second, as to whether the plaintiff, Ruth Jacoby, may obtain from defendant Bankers Life Company the cash surrender value, if any, of the extended term insurance without surrendering the policy to defendant Bankers Life Company.

From the foregoing findings of fact the Court concludes as follows:

Conclusions of Law

I.

Ruth Jacoby is the owner of all of Lionel A. Jacoby's and Betty M. Jacoby's right, title and interest in and to Contract No. 882714 issued by Bankers Life Company, Des Moines, Iowa, to or upon the life of Lionel A. Jacoby, together with all of said Lionel A. Jacoby's and Betty M. Jacoby's powers, privileges, benefits and advantages therein provided or derived therefrom (including, unless otherwise restricted but not limited to the following: any dividends, loan values, surrender values, disability benefits and the power to change the beneficiary thereunder) subject to all the terms and conditions in said contract and any indebtedness thereon. Under said Contract No. 882714 the life of Lionel A. Jacoby is insured to the face amount of \$5,000.00 on extended insurance for the term of 25 years and 84 days from December 7, 1948, without participation in surplus.

II.

The assignment executed on or about January 14, 1949, by R. G. Hines did not constitute a change of beneficiary under Policy No. 882714.

III.

Betty M. Jacoby is the beneficiary of the extended term insurance upon the life of Lionel A. Jacoby, as provided in defendant Bankers Life Company's Policy No. 882714.

IV.

Plaintiff Ruth Jacoby has the power to change

the beneficiary of Bankers Life Company's Policy No. 882714 by complying with the provisions of said policy relating to change of beneficiary.

V.

The extended insurance may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender less any indebtedness to defendant Bankers Life Company. This cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714.

VI.

Plaintiff is entitled to her costs of suit.

Let judgment be entered accordingly.

Dated: November 10, 1950.

/s/ HERBERT W. ERSKINE,
Judge.

[Endorsed]: Filed November 10, 1950.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 29,187

RUTH JACOBY,

Plaintiff,

vs.

BANKERS LIFE COMPANY, a Corporation,
Defendant.

DECLARATORY JUDGMENT

This cause came on regularly for trial on October 3, 1950, before the above named Court, Honorable Herbert W. Erskine presiding, sitting without a jury, a jury trial having been expressly waived by all parties, Francis T. Cornish, Esq., appearing as attorney for plaintiff, and Messrs. Knight, Bolland & Riordan and Burton L. Walsh, Esq. appearing as attorneys for defendant. Evidence both documentary and oral was adduced and the cause was thereupon argued and submitted, and the Court having made and filed its Findings of Fact and Conclusions of Law herein, and good cause appearing therefor:

It Is Hereby Ordered And Decreed that Ruth Jacoby is the owner of all of Lionel A. Jacoby's and Betty M. Jacoby's right, title and interest in and to Contract No. 882714 issued by Bankers Life Company, Des Moines, Iowa, to or upon the life of Lionel A. Jacoby, together with all of said Lionel A. Jacoby's and Betty M. Jacoby's powers, privileges, benefits and advantages therein provided or

derived therefrom (including, unless otherwise restricted but not limited to the following: Any dividends, loan values, surrender values, disability benefits and the power to change the beneficiary thereunder) subject to all the terms and conditions in said contract and any indebtedness thereon. Under said Contract No. 882714 the life of Lionel A. Jacoby is insured to the face amount of \$5,000.00 on extended insurance for the term of 25 years and 84 days from December 7, 1948, without participation in surplus. Betty M. Jacoby is the beneficiary of said extended insurance under the provisions of said Policy. Plaintiff Ruth Jacoby has the power to change the beneficiary of said extended insurance by complying with the terms and provisions of said Policy 882714. The extended insurance may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender less any indebtedness to defendant Bankers Life Company. This cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714, other than the physical surrender of the policy.

It Is Further Ordered And Decreed that plaintiff Ruth Jacoby shall recover from defendant Bankers Life Company her costs in the amount of \$24.72.

Dated: November 10th, 1950.

/s/ HERBERT W. ERSKINE,

Judge.

Lodged October 26, 1950.

[Endorsed]: Filed November 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73(b)

Notice Is Hereby Given that Bankers Life Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 13, 1950.

/s/ F. ELDRED BOLAND,

/s/ BURTON L. WALSH,

KNIGHT, BOLAND &
RIORDAN,

Attorneys for Appellant, Bankers Life Company, a Corporation.

[Endorsed]: Filed December 11, 1950.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by these Presents,

That we, Bankers Life Company, a Corporation, as principal and Burton L. Walsh, depositing \$250 in cash in lieu of surety or sureties, are held and firmly bound unto Ruth Jacoby in the full and just sum of Two Hundred Fifty (250) dollars, to be paid to the said Ruth Jacoby certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this——day of
—————in the year of our Lord One Thousand
Nine Hundred and——.

Whereas, lately at a District Court of the United States for the Northern District of California, Southern Division in a suit depending in said Court, between Ruth Jacoby, Plaintiff vs. Bankers Life Company, a Corporation, Defendant a judgment was rendered against the said Bankers Life Company and the said Bankers Life Company having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit, on appeal to United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Bankers Life Company shall prosecute its appeal to effect, and satisfy, if for any reason the appeal is dismissed or if the judgment is affirmed or modified such costs as the appellate court may adjudge and award, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written,

[Seal] Bankers Life Company, a Corporation.

[Seal] By /s/ BURTON L. WALSH,
Attorney in fact.

[Seal] By /s/ BURTON L. WALSH,
Depositor.

[Endorsed]: Filed December 11, 1950.

In the District Court of the United States for the
Northern District of California, Southern
Division

RUTH JACOBY,

Plaintiff,

vs.

BANKERS LIFE COMPANY, a Corporation,
Defendant.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR STAY OF
EXECUTION PENDING APPEAL

It Is Hereby Stipulated that the defendant Bankers Life Company, need not file a supersedeas bond on its appeal from the judgment herein to the United States Court of Appeals for the Ninth Circuit, and plaintiff herein waives the requirement of such bond and agrees that execution on any money judgment entered herein shall be stayed until final decision upon such appeal.

Dated: December 20th, 1950.

/s/ FRANCIS L. CORNISH,
Attorney for Plaintiff.

/s/ F. ELDRED BOLAND,
/s/ BURTON L. WALSH,
Knight, Boland & Riordan,
Attorneys for Defendant.

It Is So Ordered:

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed December 27, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the original filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, to-wit:

Complaint for Declaratory Relief and Exhibits A and B.

Summons.

Stipulation and Order Extending Time.

Answer of Defendant Bankers Life Company.

Interrogatories to be Propounded to the Defendant.

Answers to Interrogatories.

Motion to Strike Answer and Render Judgment by Default Against Defendant.

Points and Authorities in Support of Motion to Strike Answer and Render Judgment by Default Against Defendant and in Support of Motion to Compel Verified Answers to Interrogatories and for Reasonable expenses Including Attorney Fees.

Motion to Compel Verified Answers to Interroga-

tories and for Reasonable Expenses Including Attorney Fees.

Notice of Time and Place of Hearing Motions.

Notice of Motion, and Motion for Summary Judgment Under Rule 56(b). Including Affidavit of Burton L. Walsh in Support of Defendant's Motion for Summary Judgment and Exhibit A, Reasons and List of Authorities in Support of Motion for Summary Judgment Under Rule 56(b), Summary Judgment (in duplicate—unsigned), and Affidavit of Mailing.

Defendant's Reasons and List of Citations of Authorities in Opposition to Plaintiff's Motions to Strike Answer and Render Judgment by Default and to Compel Additional Answers to Interrogatories, etc., and Exhibit A.

Points and Authorities in Opposition to Motion for Summary Judgment.

Defendant's Counter-Affidavit in Support of Its Motion for Summary Judgment.

Affidavit in Opposition to Motion for Summary Judgment and Exhibits A and B.

Additional Answers of Defendant to Plaintiff's Interrogatories.

Affidavit of E. F. Bucknell in Support of Defendant's Motion for Summary Judgment.

Letter of June 9, 1950 to Judge Erskine from Cornish and Cornish.

Affidavit in Opposition to Motion for Summary Judgment Including Exhibits A, B, C, & D.

Affidavit of Francis T. Cornish in Opposition to Motion for Summary Judgment Including Exhibits A, B, C, & D.

Additional Answer of Defendant to Plaintiff's Interrogatory No. 4 Including Exhibit A.

Second Counter-Affidavit of Burton J. Walsh in Support of Defendant's Motion for Summary Judgment Including Exhibit A.

Order—Denying Motion for Summary Judgment, etc.

Clerk's Notice of June 20, 1950 re Certain Motions.

Notice of Motion and Motion to Set for Trial.

Memorandum Opinion.

Findings of Fact and Conclusions of Law.

Declaratory Judgment.

Clerk's Notice of November 13, 1950, of Entry of Declaratory Judgment.

Notice of Taxation of Costs and Memorandum of Costs and Disbursements.

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit Under Rule 73(b).

Bond on Appeal.

[Endorsed]: No. 12808. United States Court of Appeals for the Ninth Circuit. Bankers Life Company, a Corporation, Appellant, vs. Ruth Jacoby, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 10, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit
No. 12808

RUTH JACOBY,

Plaintiff and Respondent,

vs.

BANKERS LIFE COMPANY, a Corporation,
Defendant and Appellant.

APPELLANT'S STATEMENT OF THE POINT
ON WHICH IT INTENDS TO RELY ON
THE APPEAL, AND APPELLANT'S DES-
IGNATION OF THE PARTS OF THE
RECORD NECESSARY FOR THE CON-
SIDERATION THEREOF

I.

Statement of the Point on Appeal

The appellant, Bankers Life Company, intends to rely on this point on appeal:

The judgment which holds that the respondent, Ruth Jacoby, may obtain the cash surrender value of the extended term insurance under Policy No. 882714 without the physical surrender of said policy to appellant, Bankers Life Company, is contrary to and not supported by the Findings of Fact and Conclusions of Law.

II.

Designation of the Parts of the Record Necessary
for the Consideration Thereof.

The appellant, Bankers Life Company, designates the following portions of the record which now are or should be on file herein, which it thinks necessary for the consideration of the point on appeal:

1. Complaint for Declaratory Relief;
2. Answer of Defendant Bankers Life Company;
3. Findings of Fact and Conclusions of law;
4. Declaratory Judgment;
5. Notice of Appeal to the United States Court of Appeals for the Ninth Circuit Under Rule 73(b);
6. Bond on Appeal;
7. Stipulation for Stay of Execution Pending Appeal;
8. Statement of Point on Which Appellant Intends to Rely on the Appeal.
9. This Designation of Contents of Record on Appeal.

[Item 26 Memorandum Opinion]

The exhibits are not necessary.

Dated: January 17, 1951.

/s/ F. ELDRED BOLAND,

/s/ BURTON L. WALSH,

KNIGHT, BOLAND &
RIORDAN,

Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed January 18, 1951.